

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YA THAING,

No. C 08-3309 WHA (PR)

Petitioner,

**ORDER TO SHOW CAUSE**

v.

DERRAL G. ADAMS, Warden,

Respondent.

Petitioner, a California prisoner currently incarcerated at Corcoran State Prison, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

Venue is proper because the conviction was obtained in Santa Clara County, which is in this district. *See* 28 U.S.C. § 2241(d).

**STATEMENT**

A jury convicted petitioner of three sex crimes against a child. He was sentenced to fifteen years to life. His conviction was affirmed on direct appeal by the California Court of Appeal, and the California Supreme Court denied review.

**DISCUSSION**

**A. STANDARD OF REVIEW**

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must "specify all the grounds for relief which are available to the petitioner ... and shall set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. "[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'" Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970). "Habeas petitions which appear on their face to be legally insufficient are subject to summary dismissal." *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

#### **B. LEGAL CLAIMS**

As grounds for federal habeas relief, petitioner asserts that: (1) the trial court's response to a jury question about consent violated his due process rights, and his counsel was ineffective in failing to request a further instruction on consent; (2) the prosecutor was guilty of misconduct, a violation of his due process rights; (3) his due process rights were violated by the trial court's failure to define "menace" in the jury instructions; (4) his due process rights were violated by the trial court's failure to give a "*Dewberry* instruction."

These claims are sufficient to require a response.

#### **CONCLUSION**

1. The clerk shall mail a copy of this order and the petition with all attachments to the respondent and the respondent's attorney, the Attorney General of the State of California. The clerk shall also serve a copy of this order on the petitioner.

2. Respondent shall file with the court and serve on petitioner, within sixty days of service of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state

1 trial record that have been transcribed previously and that are relevant to a determination of the  
2 issues presented by the petition.

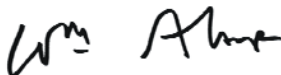
3 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the  
4 court and serving it on respondent within thirty days of service of the answer.

5 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an answer,  
6 as set forth in Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a  
7 motion, petitioner shall file with the court and serve on respondent an opposition or statement of  
8 non-opposition within thirty days of receipt of the motion, and respondent shall file with the  
9 court and serve on petitioner a reply within 15 days of receipt of any opposition. If a motion is  
10 filed it will be ruled upon without oral argument, unless otherwise ordered.

11 4. Petitioner is reminded that all communications with the court must be served on  
12 respondent by mailing a copy of the document to respondent's counsel. Papers intended to be  
13 filed in this case should be addressed to the clerk rather than to the undersigned. Petitioner also  
14 must keep the court informed of any change of address by filing a separate paper with the clerk  
15 headed "Notice of Change of Address," and comply with any orders of the court within the time  
16 allowed, or ask for an extension of that time. Failure to do so may result in the dismissal of this  
17 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). *See Martinez*  
18 *v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

19 **IT IS SO ORDERED.**

20  
21 Dated: August 4, 2008.

22   
23 \_\_\_\_\_  
24 WILLIAM ALSUP  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

YA THAING,

Plaintiff,

v.

DARRAL G ADAMS et al,

Defendant.

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Case Number: CV08-03309 WHA

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 4, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Ya Thaing F-26942  
Corcoran State Prison  
3C05-239 U  
P.O. Box 3471  
Corcoran, CA 93212-3471

Dated: August 4, 2008

Richard W. Wieking, Clerk  
By: Frank Justiliano, Deputy Clerk